

No. PD-1269-16

IN THE TEXAS COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON, CLERK

CHRISTOPHER JAMES HOLDER,
Appellant

v.

THE STATE OF TEXAS,
Appellee

On Appeal From
THE FIFTH COURT OF APPEALS, DALLAS, TEXAS
No. 05-15-00818-CR

and

THE 416TH JUDICIAL DISTRICT COURT, COLLIN COUNTY, TEXAS
No. 416-80782-2013

APPELLANT'S SUPPLEMENTAL BRIEF ON THE MERITS

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ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

Under Rule 68.4(a), Texas Rules of Appellate Procedure, the following is a complete list of the names and addresses of all parties to the trial court's final judgment, and their counsel in the trial court, and appellate counsel, so the members of the court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision and so the Clerk of the Court may properly notify the parties or their counsel of the final judgment and all orders of the Texas Court of Criminal Appeals.

1. **Trial Court:** The 416th Judicial District Court, Collin County, Texas, 2100 Bloomdale Road, McKinney, Texas 75071; The Honorable Judge Chris Oldner presided.
2. **Appellant:** Christopher James Holder, TDC Inmate No. 02006517, Eastham Unit, 2665 Prison Road #1, Lovelady, Texas 75851.
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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Appellant submits this supplemental brief on ground four in his Petition for Discretionary Review.

STATEMENT REGARDING ORAL ARGUMENT

Permission to present oral argument on ground three was requested in the Petition for Discretionary Review and granted by this Court. The Court heard oral argument on that issue September 27, 2017, at the Texas A&M University School of Law. Petitioner requests oral argument on ground four. The issues raised in grounds three and four are intertwined. Ground four raises issues significant to developing Texas constitutional law.

STATEMENT OF THE CASE

Holder was convicted of capital murder. The State did not seek the death penalty. An automatic life sentence followed. The opinion of the Court of Appeals issued August 19, 2016. It affirmed the conviction. *Holder v. State*, 2016 WL 4421362 (Tex. App. – Dallas 2016). This Court granted review on ground three of Appellant’s Petition for Discretionary Review on June 7, 2017, in PD-1269-16. On October 23, 2017 the Court granted review on ground four and ordered supplemental briefing on that issue. Both issues are pending before the Court.

SUPPLEMENTAL ISSUE PRESENTED

The Court of Appeals erred in holding the State's acquisition of Petitioner's historical cell phone records under an order issued under the federal stored communications act without a showing of probable cause in the petition was reasonable under the guarantees of privacy in Article I section 9 of the Texas constitution.

STATEMENT OF FACTS

On November 12, 2012, Plano detective Jeff Rich brought a petition to the home of the Honorable Judge Mark Rusch. The petition requested an Order authorizing AT&T to release the historical cell phone records associated with Holder's phone number for October 20, 2012 through November 12, 2012, a period of twenty-three days. 6 RR 108-109. Judge Rusch signed the Order. Rich forwarded the Order to AT&T. They rejected it. AT&T notified Rich he had to recite in the petition his need for the records was based upon "probable cause." 2 RR 115. Rich testified at the motion to suppress hearing that, "it was simpler for me to just change the wording and have it re-signed and bother the judge one more time, as opposed to waiting until later in the day, after their counsel had time to look at it and make an assessment." 2 RR 118.

After only changing the phrase “reasonable suspicion” to “probable cause,” Rich took the petition back to Judge Rusch. Judge Rusch signed that Order too. 13 RR 132-136; State’s Exhibits 7A and 7B. AT&T then emailed the records to Rich. 13 RR 131-132.

The petition upon which the order issued recited:

Petitioner has probable cause that the above records or information are relevant to a current, on-going police investigation of the following offense or incident: Death Investigation - Texas PC 19.03

The cellular telephone was used by a possible suspect to communicate with unknown persons and obtaining the locations of the handset will allow investigators to identify if this suspect was in the area at the time of the offense and will provide investigators leads in this case.

13 RR 134; State’s Exhibit 7B.

Judge Rusch was not provided with any additional information about the investigation. Rich’s petition was unsworn. No affidavits or offense reports were presented to the judge. No record of the *ex parte* meeting between detective Rich and Judge Rusch was made. 2 RR 120-127.

Appellant’s cell phone records were used by the State as evidence he was in Plano on the date of the homicide; more specifically, that he was near the victim’s residence during a time period when the murder occurred. Appellant moved to suppress this evidence. At trial, he argued the petition violated the U.S.

Constitution's fourth amendment and Article I, Section 9 of the Texas Constitution. He also contended the Petition was insufficient under the federal Electronic Communications Privacy Act. He moved to suppress the admission of the records into evidence. The trial court denied the motion. 6 RR 108-140; 2 RR; 109-140; 3 RR 8-12; CR 47-56; CR 113-127 (Trial Brief in Support); CR 399 (Trial Court's Ruling).

SUMMARY OF THE ARGUMENT

The U.S. Supreme Court held in *Carpenter v. United States*, 138 S. Ct. 2206 (2018) that an individual does have an expectation of privacy in at least seven days' worth of their cell phone records which is protected by the fourth amendment. *Id.*, at 2219. Prior to the holding in *Carpenter*, this Court held that Article I, Section 9 of the Texas Constitution provided the same protections as the fourth amendment for such records. *Hankston v. State*, 517 S.W.3d 112-113 (Tex. Crim. App. 2017). ["We hold that Appellant's rights pertaining to call logs and cell site location information possessed by a third party are the same under both the Fourth Amendment and under Art. I, § 9."]

In Appellant's case the police acquired twenty-three days' worth of cell phone records with a petition the State concedes did not establish probable cause. As a violation of the Texas Constitution, the State's use of the records should have been

suppressed under the former Article 18.21, sections 4, 5 of the Code of Criminal Procedure. *See Sims v. State*, 569 S.W.3d 634 (Tex. Crim. App. 2019) holding that exclusion under that more specific statute is appropriate for constitutional violations. The Court of Appeals erred in holding otherwise. Because the State relied heavily upon the use of the records to show that Appellant's phone was in the vicinity of the homicide during a time when the murder could have occurred, the Court should remand the case to the trial court for a new trial.

ARGUMENT

I. How Did We Get Here?

This Court had decided that the warrantless acquisition of four days' worth of historical cell-site-location records (CSLI) from a phone company does not violate the Fourth Amendment of the U.S. Constitution. *Ford v. State*, 477 S.W.3d 321, 322 (Tex. Crim. App. 2015).¹ Presciently, however, the Court noted that searching historical CSLI for an extended time might present Fourth Amendment problems.

¹ Appellant's trial was prior to *Ford* and *Hankston*. Appellant had raised both a fourth amendment claim and the Texas Constitutional claim at trial in a motion to suppress which was denied. After Appellant's trial, but prior to his brief being filed in the Court of Appeals, this Court decided *Ford*. This seemingly made a fourth amendment claim on direct appeal to the Court of Appeals meritless. Hence, relying upon *Ford*, Appellant raised only his Texas Constitutional claim on appeal to the Court of Appeals. Review had not been granted by the U.S. Supreme Court in *Carpenter*. After the opinion of the Court of Appeals in *Holder* issued, but while his PDR was pending, this Court decided *Hankston*. Hence, this Court only granted review of the statutory claim under the Federal Stored Communications Act. Then along comes *Carpenter* making his Texas Constitutional claim ripe for review.

Relying on *Ford*, the Court next held that Article I, Section 9 of the Texas Constitution provided protections no greater than the fourth amendment for such records. *Hankston v. State*, 517 S.W.3d 112 (Tex. Crim. App. 2017). There, the Court wrote:

In light of our recent decision in *Ford v. State*, we did not grant review of Appellant's Fourth Amendment claim. We did, however, agree to address an issue that was unresolved by *Ford*—whether Art. I, § 9 of the Texas Constitution affords broader protection under these facts than the Fourth Amendment provides. *We hold that Appellant's rights pertaining to call logs and cell site location information possessed by a third party are the same under both the Fourth Amendment and under Art. I, § 9.* We hold that the State's acquisition of Appellant's cell phone records pursuant to a court order did not violate Art. I, § 9 of the Texas Constitution. *Hankston v. State*, 517 S.W.3d 112, 112-13 (Tex. Crim. App. 2017). (Emphasis added.)

The U.S. Supreme Court, however, in *Carpenter v. United States*, 138 S. Ct. 2206 (2018) concluded that an individual does have an expectation of privacy in their cell phone records which is protected by the fourth amendment. *Id.*, at 2219. The Supreme Court ultimately held that Carpenter had a legitimate expectation of privacy which society is now willing to acknowledge in at least seven days of historical CSLI associated with his cell phone and that, as a result, the government violated the Fourth Amendment when it searched his phone without a warrant supported by probable cause. *Id.*, at 2221. In *Carpenter*, the mechanism by which the records were obtained was a petition and order under the federal Stored

Communications Act, 18 U.S.C. § 2703(d). This was the same method used in this case.

Interestingly, the Court did not debate whether the fourth amendment's reasonableness clause or its warrant provision controlled the outcome. It followed the analysis it used in *Riley* that the reasonableness of a search and the requirement of a warrant were interconnected when the object of the search was evidence of a crime. *See Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473, 2490, 189, *291 L. Ed. 2d 430 (2014), holding that a warrant is required to search a cell phone. The Court in *Carpenter* wrote:

Although the 'ultimate measure of the constitutionality of a governmental search is 'reasonableness,' our cases establish that warrantless searches are typically unreasonable where 'a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing.' *Vernonia School Dist. 47J v. Acton*, 515 U. S. 646, 652-653, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995). Thus, '[i]n the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement.' *Riley*, 573 U. S., at ___, 134 S. Ct. 2473, 189 L. Ed. 2d 430, 439. *Carpenter v. United States*, 138 S. Ct. 2206, 2221 (2018).

After *Carpenter*, this Court held in *Sims v. State*, 569 S.W.3d 634 (Tex. Crim. App. 2019), that Sims did not have a legitimate expectation of privacy protected by either the federal or Texas constitutions in his physical movements or his location as reflected in the less than three hours of real-time CSLI records accessed by police

by pinging his phone less than five times. *Id.* at 646. The Court said that, even in the absence of an emergency, there is no distinction between a person’s right to privacy in real time data showing where he currently is versus getting records showing where he had been. *Sims* further held that suppression of such records was controlled not by article 38.23 but by article 18.21 of the Texas Code of Criminal Procedure—since it was the more specific exclusionary rule statute. The Court reasoned that suppression is not an available remedy under Tex. Code Crim. Proc. Ann. arts. 18.21, sections 4, 5, unless the violation also violates the United States or Texas Constitution.

More recently, *Hankston* was remanded by the U.S. Supreme Court to this Court for consideration of the fourth amendment claim in the light of *Carpenter*. *Hankston v. Texas*, 138 S. Ct. 2706 (2018). This Court complied by sending *Hankston* back to the Court of Appeals for reconsideration of his fourth amendment claim. *Hankston v. State*, ___ S.W.3d ___, No. PD-0887-15, 2019 WL4309685 (Tex. Crim. App. Del. Sept. 11, 2019). Noting that Holder did not raise a fourth amendment claim in the Court of Appeals, the Court declined Holder’s invitation to also remand his case to the Court of Appeals for reconsideration of his Texas Constitutional claim in the light of *Carpenter*. Instead, the Court has retrospectively granted his Article I, Section 9 claim for analysis of how *Carpenter* may affect Holder’s claim under the Texas Constitution.

II. The Fourth Amendment and Article One Section Nine Require A Judicial Finding of Probable Cause for Twenty-Three Days' Worth of Historical CSLI.

The issue upon which the Court originally granted review was whether the petition was sufficient to meet the lesser threshold of stating “specific and articulable facts” required by federal law under 18 U.S.C. § 2703(d). During oral argument on this case, the State’s attorney conceded in response to Judge Keasler’s and Judge Newell’s questions that the petition did not set forth sufficient facts to establish probable cause. *See and hear* video of Oral Argument <http://www.texasbarcle.com/CLE/CCAPLAYER5.ASP?sCaseNo=pd-1269-16&bLive=&k=&T=> at 38:54 – 39:40, pd 1269-16. The State has never asserted this petition would establish probable cause. That ground of error is still pending.²

This Court has already decided in *Hankston* that the protections for historical CSLI under Article One, Section Nine of the Texas Constitution are tethered in

² The resolution of the previously granted ground of error is settled circuitously by *Carpenter*’s determination that using 18 U.S.C. § 2703(d) to acquire historical CSLI by a petition and order is pointblank unconstitutional under the fourth amendment. In fact, *Carpenter* states that—regardless of the length of time for which records are requested—the obtaining of historical CSLI through the method of a petition and order under 18 U.S.C. § 2703(d) is unlawful under the fourth amendment. The Court said: “Consequently, an order issued under Section 2703(d) of the Act is not a permissible mechanism for accessing historical cell-site records. Before compelling a wireless carrier to turn over a subscriber’s CSLI, the Government’s obligation is a familiar one—get a warrant.” *Carpenter v. United States*, 138 S. Ct. 2206, 2221 (2018). That the petition in this case issued *sub rosa* by Judge Rusch at night from his home failed to issue upon a judicial determination of probable cause, and, by definition was not a warrant, should be enough to resolve this case for Appellant. Hence, *Appellant’s initial ground of error is dispositive on fourth amendment grounds.*

lockstep to the same protections afforded by the fourth amendment. *Hankston*, 517 S.W. 3d at 121–22 (“we have long held that the Fourth Amendment and Art. I, Section 9 both protect the same right to the same degree”). The acquisition of twenty-three days’ worth of Holder’s records without a warrant obviously exceeds the seven days’ worth of records procured in *Carpenter*. That same lockstep analysis should cause a consistent result—having failed to get a warrant, the seizure of Holder’s records was unconstitutional under the Texas Constitution.

In *Sims*, the Court acknowledged that the third-party doctrine is no longer an obstacle to a person challenging the government’s acquisition of cell phone data. Instead, the Court holds it is a question of degree—that is, how much privacy has the government has invaded. “There is no bright-line rule for determining how long police must track a person's cell phone in real time before it violates a person's legitimate expectation of privacy in those records,” the Court wrote. *Sims, id.*, at 646 (Tex. Crim. App. 2019). *Sims* approves warrantless sneak, peek, and seize—so long as it is nippy. But, in footnote, the Court in *Sims* concedes the existence of a privacy interest in seven or more days of historical CSLI as recognized by *Carpenter*.

For example, the Supreme Court noted in *Carpenter* that the police violated a recognized expectation of privacy when they accessed *at least* seven days of Carpenter's CSLI. What it meant by that statement is not totally clear. The Court might have meant that accessing less than seven days of historical CSLI *could* also violate a legitimate expectation of privacy, but that it did not need to address the issue because seven days was sufficient to decide the issue, or it might have meant that a person has a recognized expectation of privacy in seven

days or more of CSLI, but no less. *Carpenter*, 138 S. Ct. at 2217 n.3.

Sims v. State, 569 S.W.3d 634, 646 n.17 (Tex. Crim. App. 2019).

From *Carpenter*, *Hankston* and *Sims* “it must follow, as the night the day”³ that the Court of Appeals erred in holding that the acquisition of Appellant’s historical CSLI without a warrant or probable cause did not violate Article I, Section 9 of the Texas Constitution. An analysis of this Court’s contemporary interpretation of that provision of the Texas Constitution also supports that conclusion.

III. Of Locksteps, Floors, Ceilings, and Elevators.

In text, at least, Article I, Section 9 of the Texas Constitution mirrors its federal fourth amendment counterpart in requiring reasonableness in intrusive governmental action. The language of the Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The language of the Texas Constitution provides:

³ Polonius to Laertes: “This above all: to thine own self be true, ***And it must follow, as the night the day, Thou canst not then be false to any man.” *Hamlet* Act 1, scene 3, 78–82.

The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be; nor without probable cause, supported by oath or affirmation.

Tex. Const. art. I, 9.

Both provisions comprise two clauses: the Reasonableness Clause, which prohibits unreasonable searches and seizures; and, the Warrant Clause, which provides that warrants may issue only upon showing probable cause. The Court of Criminal Appeals historically has recognized the language of Article I, Section 9 and the Fourth Amendment as "the same in all material aspects." *Heitman, id.*, at 682. And, see *Crowell v. State*, 147 Tex. Crim. 299, 180 S.W.2d 343 (1944), and *Evers v. State*, 576 S.W.2d 46 (Tex. Crim. App. [Panel Op.] 1978). But, if an era of harmonious interpretation of the privacy protections afforded by both constitutions ever existed, it ended with the cases of *Heitman*, *Autran*, and *Hulit*.

A metaphorical building is often used to explain how the Fourth Amendment establishes the floor of protection while the state constitution sets the ceiling. Perhaps the first Texas court to use the analogy was the Texas Supreme Court. See *LeCroy v. Hanlon*, 713 S.W.2d 335, 338 (Tex. 1986). Relying upon a scholarly review of the "Journals of the Constitutional Convention of 1845," the Court of Criminal Appeals in *Heitman* said: "The federal constitution sets the floor for

individual rights; state constitutions establish the ceiling." *Heitman v. State*, 815 S.W.2d 681, 690 (Tex. Crim. App. 1991).

A different analogy—a lockstep—is championed by other judges to describe the parameters of privacy protected by the Texas Constitution *vis a vis* the U.S. Constitution. Under a lockstep analysis state constitutional provisions are tethered to their parallel federal counterparts. Violating one, violates the other; satisfying one, satisfies the other. Among the adherents to the lockstep approach are Judge Keasler. See Michael E. Keasler, J. Texas Court of Criminal Appeals, *Symposium: Independent State Ground: Should State Courts Depart From The Fourth Amendment In Construing Their Own Constitutions, And If So, On What Basis Beyond Simple Disagreement With The United States Supreme Court's Result?: The Texas Experience: A Case For The Lockstep Approach*, 77 Miss. L.J. 345 (2007). In Judge Keasler's view, Article I, Section 9 should march in lockstep to the federal constitution.⁴ In the lockstep view, a “new federalism” approach, permitting the protections afforded by State constitutional rights to fluctuate from settled federal

⁴ To date, Judge Keasler remains faithful to his “lockstep” beliefs. In 2011, he wrote, “I also agree with former Presiding Judge McCormick's dissent in *State v. Ibarra*: ‘the federalization of this State's criminal law and the vast expansion of federal power into areas that traditionally had been reserved solely to the states preempt any ‘independent’ state constitutional analysis.’ The practical implications of this approach noted by Presiding Judge McCormick are highly persuasive. Law enforcement and defendants would be aware of the applicability and scope of the protections and rights, and appellate courts would not have to grapple with different burdens and frameworks.” *Fleming v. State*, 341 S.W.3d 415, 417 (Tex. Crim. App. 2011).

precedent, is problematic to the needs of law enforcement and courts for consistency and predictability.

Even before *Heitman*, however, some judges were not inclined to do the lockstep. For example, Judge Clinton urged through dissent in *Eisenhauer v. State*, 754 S.W.2d 159, 166 (Tex. Crim. App. 1988 (Clinton, J., dissenting)), that Article I, Section 9, like the fourth amendment, should be analyzed in light of its own history. He argued that it was significant that Article I, Section 9 was drafted when Texas was an independent republic. The Framers of the Texas Constitution, he believed, were more likely influenced by the declarations established by other states and territories similar to Texas than from the language or policy reasons supporting the Fourth Amendment. The Fourth Amendment could provide no protection to citizens of The Republic of Texas. And, even after Texas joined the Union, the Fourth Amendment remained a restriction only upon the federal government. In Judge Clinton's view, any resemblance between Section 9 and the Fourth Amendment was coincidental. ["C]orrectly comprehended, that section 9 reads like the Fourth Amendment is merely a coincidence of historical facts." *Id.*, at 170.

Although the *Heitman* court ultimately decided that both constitutions provided the same level of protection to the right in question, it reached that conclusion relying solely on state precedent to interpret the limitations of Article I, Section 9. *Heitman*, *id.*, at 690. Nevertheless, *Heitman* did embrace the floor and

ceiling metaphor. Texas courts, the *Heitman* court wrote, are “free to reject federal holdings as long as state action does not fall below the minimum standards provided by federal constitutional protections.” *Id.*, at 682. The proclamation of “we have the right to independent interpretation of our constitution” was to be steadied by the notion at least that U.S. Supreme Court decisions set a ground level floor for privacy protections.

In *Autran v. State*, 887 S.W.2d 31, 33 (Tex. Crim. App. 1994), the Court established that the ceiling for protection under Article 1, Section 9 could be higher than what the Supreme Court said was afforded by the fourth amendment. *Autran* held that the Texas Constitution provided greater protection in the context of inventory searches than the Fourth Amendment. It said that the Texas Constitution provided a privacy interest in closed containers that was not overcome by police interest in protection of a suspect's property.

The floor/ceiling metaphor was quaked a few years later, however, in *Hulit*. *Hulit v. State*, 982 S.W.2d 431 (Tex. Crim. App. 1998). One might say from reading *Hulit* that Article 1, Section 9 functions like an elevator in the building. Under that view, the Court of Criminal Appeals may interpret the Texas Constitution to afford greater or even lesser protections as its federal counterpart. Under this elevator approach, the Court determines privacy protections secured by the Texas Constitution independently, and case by case. The protections of those rights can

rocket past the floor of the federal constitution and go to the penthouse. Or, like the elevator at Disney's Tower of Terror, they can plunge without warning to a Twilight Zone in a constitutional cellar. In *Hulit*, a plurality punched the down button on the elevator.

Hulit's majority opinion was written by Judge Womack and joined by Presiding Judge McCormick, a dissenter in *Heitman*, and Judges Mansfield, Keller, and Holland. *Id.*, at 432. Besides joining the majority opinion, concurring opinions were written by Presiding Judge McCormick, Judge Meyers, and Judge Keller. *Id.*, at 438. Although Judge Price did not join in the majority opinion, he also wrote a concurring opinion. *Id.* Judge Baird wrote a dissenting opinion in which Judge Overstreet joined.

Textual similarities and federal supremacy arguments aside, in *Hulit*, the court said that a "natural reading" of Article I, Section 9 did not lend itself to the interpretation that Texas's provision requires a warrant to ensure reasonableness. *Id.*, at 435. Overlooking the floor and ceiling analogy hugged by *Heitman*, *Hulit* said the two constitutions existed in two different buildings. The Court of Criminal Appeals, it reasoned, is free to interpret the Texas Constitution to provide whatever protections it divined were the original intent of Texas' creators.

Brushing aside *Heitman's* clearly stated floor/ceiling analogy as apocryphal and fake news, *Hulit* reasoned, "*Heitman* does not mean that the Texas Constitution

cannot be interpreted to give less protection than the federal constitution. It only means that the Texas Constitution will be interpreted independently. ... Its protections may be lesser, greater, or the same as those of the federal constitution." *Id.*, at 437.

IV. Go Into the Light.

In *Richardson*, the Court dealt with pen registers, not cell phone records. But, the Court observed then that, "Even if the language of Article I, section 9 were identical with that of the Fourth Amendment, we must construe that language according to our own lights." *Richardson v. State*, 865 S.W.2d 944, 948 (Tex. Crim. App. 1993). In *Hankston*, the Court has already shown the light to follow in this appeal. As to the protections afforded by the Texas Constitution to historical CLSI the Court wrote, "we agree with the reasoning of *Johnson*, which mirrors the logic of *Crittenden*." *Hankston, id.*, at 120 (Tex. Crim. App. 2017). In both *Crittenden v. State*, 899 S.W.2d 668 (Tex. Crim. App. 1995) and *Johnson v. State*, 912 S.W.2d 227 (Tex. Crim. App. 1995), this Court found that Art. I, section 9 and the Fourth Amendment provide the same protection against unreasonable searches and seizures. *See Hankston, id.*, at 119 (Tex. Crim. App. 2017).

Thus, this Court sensibly concluded in *Hankston* that "even though we are not bound by Supreme Court case law when it comes to interpreting our State Constitution, we are not precluded from following it either." *Id.* at 120. "This

reasoning is particularly appropriate when the state constitutional provision we are interpreting and its federal constitutional counterpart are almost identically worded,” as are the Fourth Amendment and Article I, section 9.⁵ *Id.* Accordingly, the Court is “free to adopt the Supreme Court’s interpretation of the Fourth Amendment . . . simply because it ‘makes more sense.’” *Id.* And as this Court explained, it makes sense for state constitutional interpretation to follow Fourth Amendment interpretation when it comes to cell phone location data: “if we are not going to find that the acquisition of cell phone records is a search under the Fourth Amendment, then we are not going to find that the acquisition of cell phone records is a search under Art. I, § 9.” *Id.*

After *Carpenter*, there can be no question that for the government to obtain seven days or more of historical CSLI the federal constitution requires a warrant

⁵ The experience of other states illustrates that when there are material differences between the text of the Fourth Amendment and the state constitution, there may be good reason to interpret the state constitution to provide less protection. As the Michigan Supreme Court has explained, for example, “Michigan’s constitutional prohibition against unreasonable searches and seizures is to be construed to provide the same protection as that secured by the Fourth Amendment, absent, compelling reason to impose a different interpretation.” *People v. Custer*, 630 N.W.2d 870, 876 n.2 (Mich. 2001) (internal quotation marks omitted). The Michigan Constitution resembles the Fourth Amendment in most respects, but diverges by expressly limiting the scope of the exclusionary rule to disallow suppression of “any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.” Mich. Const. art. I, § 11. Thus, there is compelling reason to interpret the Michigan Constitution as less protective than the Fourth Amendment when it comes to the exclusionary rule: “[I]f [a narcotic drug] has been seized outside the curtilage of a dwelling house, Michigan’s constitutional prohibition . . . would not be applicable, although the Fourth Amendment’s would be.” *Custer*, 630 N.W.2d at 876 n.2. Here, because Article I, section 9 and the Fourth Amendment are “almost identically worded,” *Hankston*, 517 S.W.3d at 120, there is no sound reason for their interpretation to diverge.

issued upon probable cause. Likewise, after *Hankston*, there can be no serious debate that Article I, section 9 of the Texas Constitution also required probable cause for the seizure of twenty-three days of Holder's records.

Indeed, it “makes more sense” to adopt the Supreme Court's rule in *Carpenter* under Article I, section 9. “As with the Fourth Amendment, the purpose of Article I, Section 9 is to safeguard an individual's legitimate expectation of privacy from unreasonable governmental intrusions.” *Richardson*, 865 S.W.2d at 948. *Carpenter*'s explanation why people have a legitimate expectation of privacy in their historical cell site location information, at least over an extended period, is no less applicable under the state constitution.

As the Court made clear in *Carpenter*, constitutional search and seizure protections must take account of the “seismic shifts in digital technology that [have] made possible the tracking not only of [one defendant's] location but also everyone else's, not for a short period but for years and years.” *Carpenter*, 138 S. Ct. at 2219. Thus, it is inappropriate to “mechanically apply[]” older rules, including the third-party doctrine, to digital-age realities. *Id.* Instead, in deciding whether the government has impinged on a reasonable expectation of privacy, courts should look to the nature of the information accessed by the government and whether that information was voluntarily exposed. *Id.* at 1119–20. As the Supreme Court concluded, “[i]n light of the deeply revealing nature of CSLI, its depth, breadth, and

comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection.” *Id.* at 2223.

Leaving large aggregations of Texans’ historical cell site location information open to warrantless search would open up their myriad “privacies of life” to easy government scrutiny. *Carpenter*, 138 S. Ct. at 2217; *accord Sims*, 569 S.W.3d at 646. This “intimate window into a person’s life, revealing not only his particular movements, but through them his ‘familial, political, professional, religious, and sexual associations,’” *Carpenter*, 138 S. Ct. at 2217 (citation omitted), is no less deserving of protection under the Texas Constitution than the federal one. As the Supreme Court has explained, “[a]s technology has enhanced the Government’s capacity to encroach upon areas normally guarded from inquisitive eyes, [courts must] ‘assure [] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.’” *Id.* at 2214 (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)) (final alteration in original). “Insofar as Article I, Section 9 of the Texas Constitution was directed at preventing the same evil that the Fourth Amendment was intended to prevent,” *Hulit*, 982 S.W.2d at 436, it should equally guard against warrantless police access to a technology that makes

pervasive surveillance “remarkably easy, cheap, and efficient compared to traditional investigative tools.”⁶ *Carpenter*, 138 S. Ct. at 2218.

In light of the reasonable expectation of privacy in the 23 days of historical CSLI in this case, this Court should further follow *Carpenter* in concluding that the acquisition of longer-term CSLI with a mere court order issued upon a “reasonable grounds” standard is unreasonable under Article I, section 9. That conclusion is not required because of any Fourth Amendment presumption in favor of warrants. *See Hulit*, 982 S.W.2d at 434–36 (rejecting the argument that Article I, section 9 imposes a *per se* warrant requirement). Rather, it is because, looking to the “totality of circumstances,” the procedure used in this case was unreasonable. *See id.* at 436. As the Supreme Court explained in *Carpenter*, subpoenas and similar forms of compulsory process (like the order in this case) are appropriate in many

⁶ Because of advances in cellular technology, there is an even greater need for constitutional protection for CSLI today than there was when *Carpenter* was decided. As the Supreme Court noted, “the accuracy of CSLI is rapidly approaching GPS-level precision.” *Carpenter*, 138 S. Ct. at 2219. That is partly because, “[a]s the number of cell sites has proliferated, the geographic area covered by each cell sector has shrunk, particularly in urban areas.” *Id.* Since the decision in *Carpenter*, the major cellular service providers have begun upgrading their networks to 5G technology, which relies on small cell sites “placed an average of 500 feet apart in neighborhoods and business districts,” meaning that the coverage area (and therefore the locational precision) of each cell site will be extremely small compared to traditional cell towers. Allan Holmes, *5G Cell Service is Coming. Who Decides Where it Goes?*, N.Y. Times, Mar. 2, 2018, <https://www.nytimes.com/2018/03/02/technology/5g-cellular-service.html>. Rollout of 5G networks has already begun in a number of Texas cities. *See, e.g.*, Paul Thompson, *AT&T Announces 5G Rollout in Austin – but Won’t Say Where*, Austin Bus. J., Apr. 9, 2019, <https://www.bizjournals.com/austin/news/2019/04/09/at-t-debuts-5g-in-austin-but-questions-abound.html> (noting initial 5G rollout by AT&T in Austin, Dallas, Waco, San Antonio, and Houston).

circumstances. *Carpenter*, 138 S. Ct. at 2222. But they are unreasonable in the situation presented here, where the government seeks to compel “third parties [to produce] records in which the suspect has a reasonable expectation of privacy.” *Id.* at 2221. In this situation, the protections that make ordinary subpoenas reasonable—notice and an opportunity for pre-enforcement challenge, see *Donovan v. Lone Steer, Inc.*, 646 U.S. 408, 415 (1984)—are absent, because the recipient of the government demand is a company that lacks the knowledge or incentive to seek judicial review, and because the individual who holds the expectation of privacy will receive no notice until it is too late, if at all. And because the “reasonable grounds” showing required for issuance of the order here “falls well short of the probable cause required for a warrant,” it is insufficient protection for the weighty privacy interest at issue. *Carpenter*, 138 S. Ct. at 2221.

The State concedes its petition did not state enough information to establish probable cause in this case. After *Sims*, it is clear that suppression is required under former article Tex. Code Crim. Proc. Ann. arts. 18.21, sections 4, 5.⁷

The harm from introducing these records into evidence is evident from the opinion of the Court of Appeals. Despite not proving a time of death, the State relied heavily upon Holder’s cell phone records in its effort to establish that he was near the victim’s home during a range of time when the murder occurred. See *Holder v.*

⁷ That section has now been re-codified at Tex. Code Crim. Proc. Art. 18B.553.

State, No. 05-15-00818-CR, 2016 Tex. App. LEXIS 9107, at *30 (Tex. App.—Dallas Aug. 19, 2016). This Court must reverse and remand for a new trial.

PRAYER

Appellant respectfully requests this Honorable Court reverse the opinion of the Court of Appeals, and remand this case to the trial court for a new trial.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Appellant's Brief on the Merits was delivered by electronic e-filing to the Collin County District Attorney; and to the State Prosecuting Attorney, and that a copy was mailed to the Appellant, Christopher James Holder on the 11/7/19, 2017.

/s/ Steve Mears

STEVEN R. MIEARS

CERTIFICATE OF WORD COUNT

Counsel for the Appellant certifies that in accordance with Rule 9.4 of the Texas Rules of Appellate Procedure the word count is 6,683 words and within the word limitation requirements.

/s/ Steve Mears

STEVEN R. MIEARS